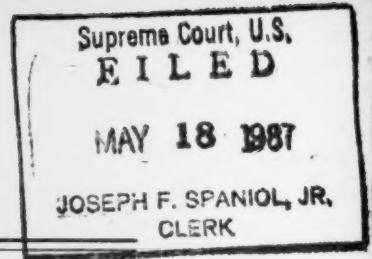


No. 86-1399

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In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT E. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

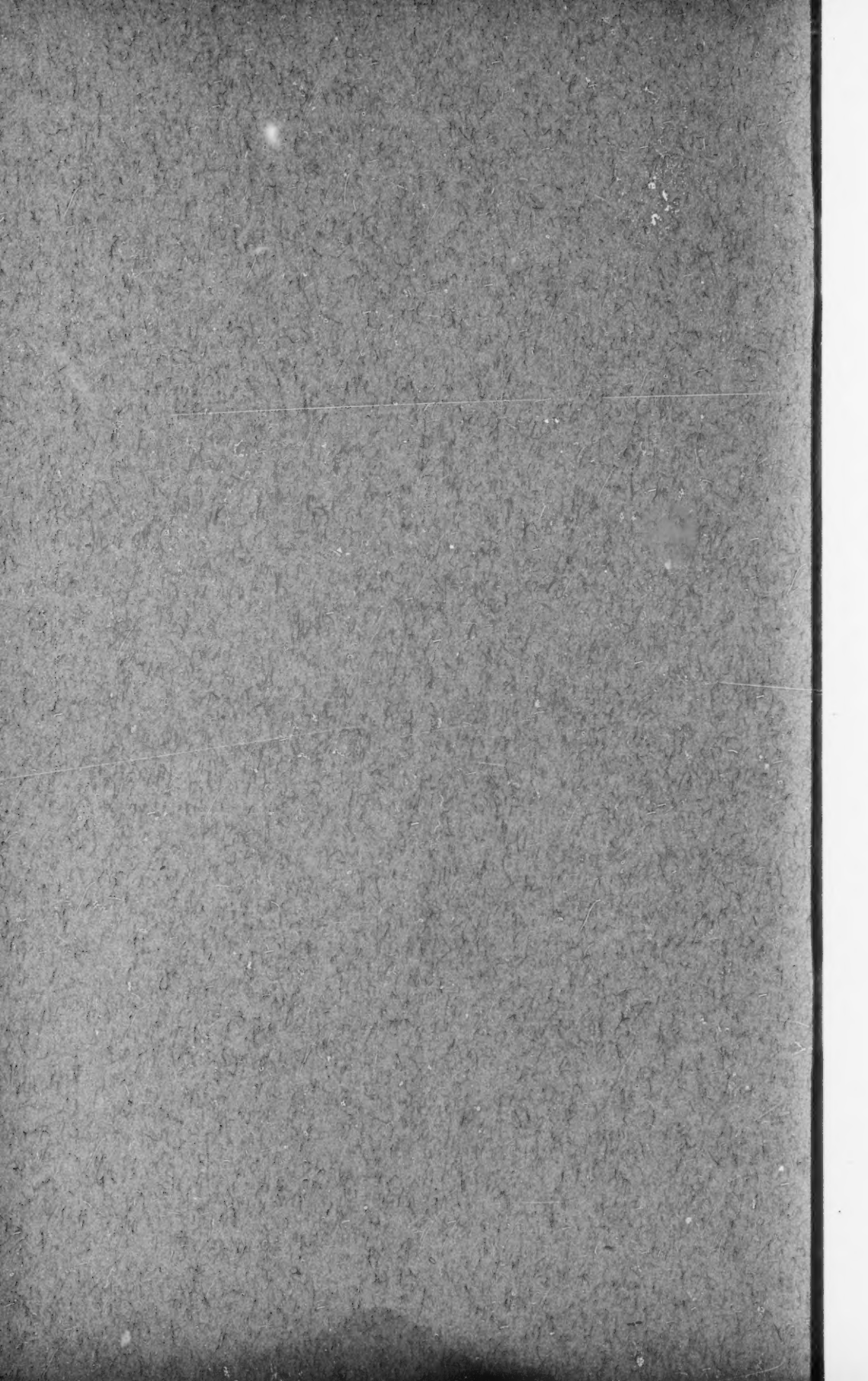
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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding certain expert testimony on the ground that an adequate foundation had not been laid for its admission.

2. Whether the district erred in instructing the jury that an understatement of gross receipts on an income tax return is a "material matter" within the meaning of 26 U.S.C. 7206(1).

3. Whether the district court erred in quashing a subpoena seeking to compel a government attorney to testify concerning a sentence contained in the statement of facts in a government brief in another case.

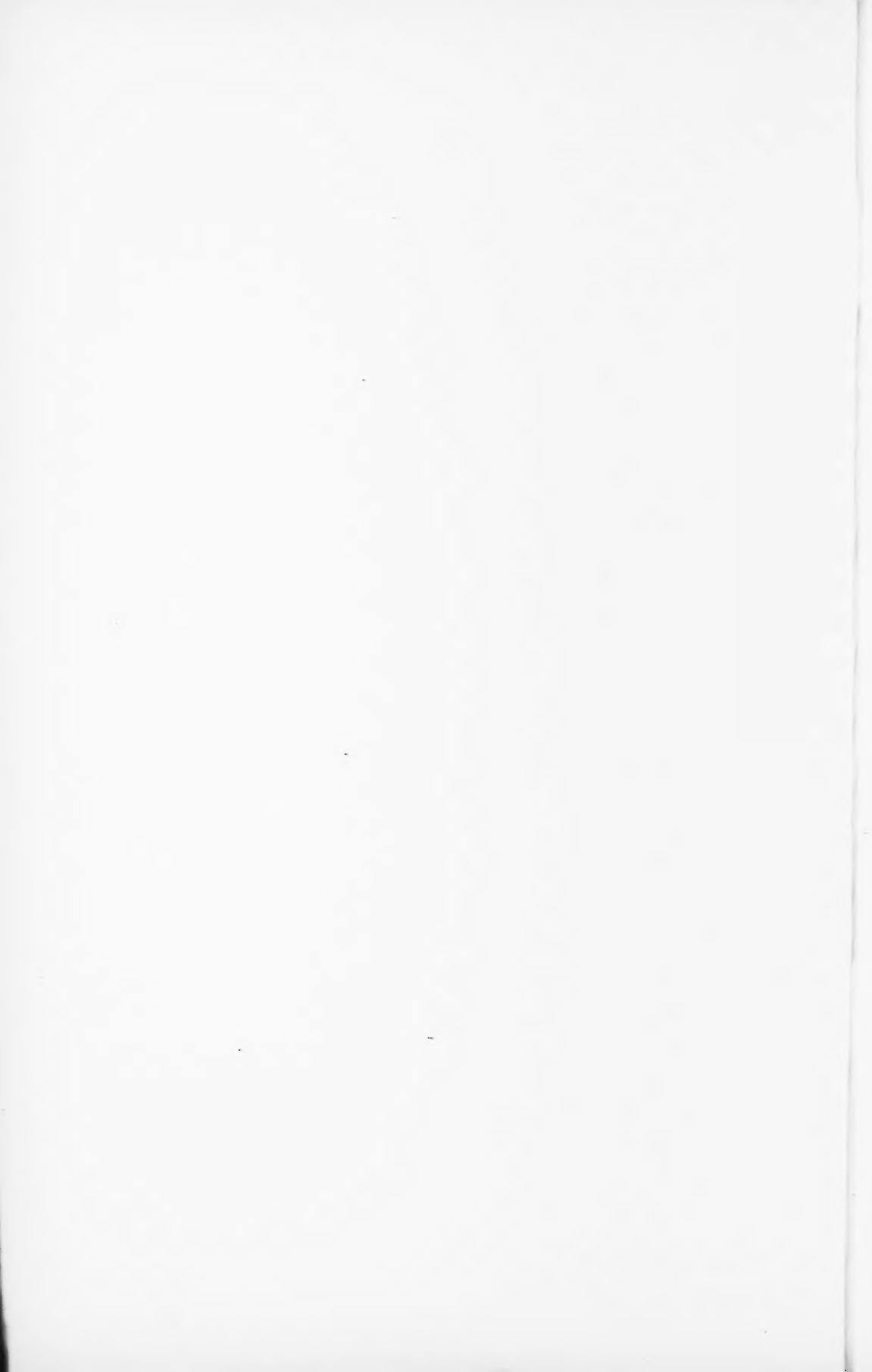


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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 804 F.2d 116.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1986. A petition for rehearing was denied on January 5, 1987 (Pet. App. A8). The petition for a writ of certiorari was filed on February 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on four counts of filing false corporate income tax returns for the years 1978 through 1981, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to one year's imprisonment and fined \$20,000. The court of appeals affirmed (Pet. App. A1-A7).

Petitioner is a businessman who, during the prosecution years, operated Bob Young Agency, Inc., a corporation owned by him and his wife (Tr. 54, 1187). The corporation included a general insurance agency, a real estate agency, and a bail bond business (Tr. 49-50, 1155). Evidence introduced at trial established that petitioner failed to report gross receipts in the amounts of \$86,977; \$107,055; \$120,633; and \$82,455, on the corporate tax returns for the four tax years at issue (GX 127; Tr. 923). The understatement resulted primarily from petitioner's failure to report income from the bail bond business (Tr. 770-771; GX 161).

Considerable evidence showed that petitioner knew that all the corporate income was not being reported. Although petitioner's net worth was increasing each year, substantial losses were being declared on both his personal and corporate tax returns (Tr. 1201-1202). Petitioner was personally involved in the operation of the bail bond business (Tr. 54-55, 120, 1205-1207), and he knew that all of the bonding income was not deposited in the bail bond account (Tr. 1227-1230). Instead, the bail bond income either was deposited in a personal account (Tr. 1228-1229), which was never furnished to the corporate tax return preparers (Tr. 661-666), or was simply unaccounted for. The bonding income was not reported on petitioner's personal income tax returns, and petitioner specifically told his personal tax return preparers that various income items from the bonding business need not be accounted for on his personal returns (Tr. 639-647, 820-833; GXs 59, 60, 61).

Petitioner's primary defense at trial was that the bail bond income constituted personal income and therefore need not have been declared on the corporate returns. This defense was submitted in the face of overwhelming evidence that the bail bond income constituted corporate income, including evidence that (1) agreements and other correspondence with various surety companies were signed using

the corporate name (GXs 21, 26, 28, 49, 50, 51, 56, 104-117); (2) the accountants who prepared the corporate returns and petitioner's personal returns understood, from their contacts with petitioner and his employees, that the bail bonding income was being accounted for on the corporate returns (Tr. 644-647, 662, 696, 832-833; GXs 62-66); (3) an employee who devoted most of her efforts to the bail bonding business was paid by the corporation (Tr. 92-93; GX 133); (4) petitioner stated to Internal Revenue Service agents that the bail bonding business was part of the corporation (Tr. 769, 862); and (5) petitioner indicated in various civil pleadings that the bail bonds constituted corporate activity (Tr. 1294-1295, 1301-1302; GXs 120, 121). Petitioner also argued that the gross receipts for the bail bonding business were reflected in a reported figure for "commissions" that allegedly "netted out" the gross receipts and expenses of the business.

ARGUMENT

1. Petitioner disputes (Pet. 8-9) the court of appeals' holding that the district court did not commit reversible error in refusing to admit certain expert testimony. The court of appeals' ruling was correct and does not warrant review by this Court.

At trial, petitioner attempted to introduce summary charts prepared by an accountant, which allegedly constituted an analysis of petitioner's bonding business bank account for the 1980 calendar year (Tr. 1245-1248, 1266-1268, 1279-1281). Petitioner asserted that the summary charts and the expert's proffered testimony would tend to prove that the bail bond business showed a net loss of approximately \$500 during that year and that the corporation's net income therefore was not understated (Tr. 1263). During voir dire examination of the witness, the government elicited testimony that the witness's analysis was based on the assumptions that the account was not a corporate

account, that most of the deposits constituted personal income, and that most of the checks written on the account constituted expenses (Tr. 1249-1250). The expert witness also testified that if the account had been treated as a trust account, as petitioner's corporate accountants testified that it should have been, his net figures would be incorrect (Tr. 1281-1284). Consequently, the government objected to the exhibits on the ground that petitioner had failed to lay a proper foundation to establish that the exhibits were relevant (Tr. 1250-1261, 1264-1265, 1268-1273, 1284-1285). The trial court sustained the government's objection (Tr. 1263-1265, 1274, 1285), and the court of appeals upheld that ruling (Pet. App. A7).

As petitioner acknowledges (Pet. 8), it is well established that a district court has broad discretion to determine the admissibility of evidence, and a reviewing court will reverse the district court's decision only upon a clear showing of abuse of discretion. See, e.g., *Hannch v. City of Overland*, 795 F.2d 1385, 1388-1389 (8th Cir. 1986). Petitioner does not seek to demonstrate that the district court abused its discretion; he makes no effort to rebut the difficulties with the proffered testimony that impelled the district court to reject it for lack of foundation. Rather, petitioner's objection is focused entirely on the adequacy of the inquiry made by the court of appeals. Petitioner asserts that the court of appeals "did not inquire into the relevancy of the offered testimony," but instead merely "deferred to the trial court" (Pet. 9). Accordingly, petitioner concludes that the result of the court's decision is that "a defendant in a criminal case simply has no chance for any significant review of evidentiary errors made in the court below" (*ibid.*). This contention is without merit.

In the court of appeals, the government made the following points in defense of the district court's order excluding the expert testimony (see Pet. App. A6). First, the calculations offered by petitioner's expert witness were not based

on the fiscal tax year, as were the corporate tax returns. Second, petitioner's corporate accountants viewed the account as a trust account; consequently, they treated deposits to the account as liabilities, rather than income, and they treated the withdrawals from the account as "pass through" items, rather than expenses (see Tr. 670-673, 694, 707-711). Third, the account was not used as a depository for all of the receipts from the bonding business (see Tr. 892-893, 1227-1230). The government further noted that the witness had acknowledged that his testimony would not be relevant if the account had been treated by petitioner's accountants as a trust account, which is what the evidence showed (Tr. 1281-1284).

The court of appeals reviewed these arguments together with petitioner's counterarguments and correctly concluded that the district court's decision excluding the evidence for lack of foundation "did not constitute reversible error" (Pet. App. A7).¹ The court noted in this connection that "the trial court * * * was in a much better position than [the court of appeals] to rule on the question [of admissibility]" (*ibid.*). Petitioner's criticism (Pet. 9) of this statement is unfounded; the statement represents no more than a

¹Because the court of appeals upheld the district court's ruling that there was no adequate foundation for the testimony in question, there was no reason for the court to "inquire into the relevancy of the offered testimony" (see Pet. 9). In any event, the evidence was not relevant. Petitioner was charged with failing to report gross receipts on his corporate return, primarily from his bail bond business. The primary defense that the bail bond business was not part of the corporation did not depend upon whether there was a loss from that business, as the expert proposed to testify. His testimony thus would not have aided the jury in resolving that issue. To the extent that the accountant's testimony was proffered to show that the corporate returns were essentially accurate even if the bail bonding business was part of the corporation, the testimony was meaningless, because the accountant analyzed the account on the basis of a calendar year, and the corporation used a fiscal year in calculating income.

recognition of the “well known rule” (Pet. 8) that a trial court’s decision to exclude evidence should be upheld in the absence of an abuse of discretion. Accordingly, neither the court of appeals’ holding nor anything in its opinion provides support for petitioner’s assertion that the decision eliminates any chance for a defendant to challenge a trial court’s evidentiary rulings.²

2. Petitioner also contends (Pet. 10-11) that the district court improperly instructed the jury with respect to the materiality of the false statements alleged in the indictment. This contention is also without merit, for several reasons.

The trial court instructed the jury that the materiality of the false statements alleged in the indictment was a question of law to be decided by the court. The court further instructed that the alleged false statements, if proved beyond a reasonable doubt, were material because “statements pertaining to the taxpayer’s gross receipts are essential for ascertaining or verifying the correctness of the tax declared in an income tax return” (Pet. 10). Petitioner argues that the court’s instruction was improper because it permits conviction under Section 7206(1) where a taxpayer does not report either gross receipts or expenses on a corporate income tax return, but accurately reports the “netted amount” elsewhere on the return.

²Petitioner asserts that the decision below conflicts with *United States v. McLaughlin*, 663 F.2d 949 (9th Cir. 1981), but that case is completely inapposite. In *McLaughlin*, the court of appeals reversed the trial court’s finding that proffered testimony regarding prior inconsistent statements failed to meet the express foundational prerequisites of Rule 613(b) of the Federal Rules of Evidence. The court of appeals held that the trial court had misinterpreted Rule 613(b) and that its foundational prerequisites could be satisfied simply by recalling the witness to give him an opportunity to explain the apparently inconsistent statements. That holding is quite irrelevant to the district court’s evidentiary ruling here, which turned on the defects in the assumptions underlying the proffered testimony. The decision below thus does not conflict in any way with *McLaughlin*.

Petitioner's argument fails on two counts. First, the court's instruction correctly stated the applicable law; it is well established that an understatement of gross receipts is a "material matter" within the meaning of Section 7206(1). Second, even if petitioner were correct that the example he sets forth at pages 10-11 of the petition does not involve a material misstatement, that example bears no resemblance to the facts here. There was ample evidence that petitioner intentionally failed to report all the gross receipts from his bail bond business and that petitioner's accountants had not simply "netted out" the gross income from the business. Thus, the false statements here were material under any standard.

a. Petitioner does not dispute the well-settled proposition that materiality under Section 7206(1) is a question of law to be decided by the court. See, e.g., *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984) (collecting cases); but see *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). Furthermore, the courts of appeals have uniformly held that a misstatement of gross receipts is a "material matter" within the meaning of Section 7206(1). See *United States v. Greenberg*, *supra*; *United States v. Marabelles*, 724 F.2d 1374, 1380 (9th Cir. 1984); *United States v. Strand*, 617 F.2d 571, 574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States v. Taylor*, 574 F.2d 232, 235-237 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States v. Ballard*, 535 F.2d 400 (8th Cir.), cert. denied, 429 U.S. 918 (1976); *United States v. Morse*, 491 F.2d 149 (1st Cir. 1974). Petitioner cites no case to the contrary. Thus, it is clear that the district court's instruction correctly stated the law.

Examination of the purpose of Section 7206(1) strongly supports the conclusion that a failure to list all gross receipts is material, even if the proper amount of taxable income appears elsewhere on the return. Section 7206(1)

seeks to ensure not only that a taxpayer pay the proper amount of taxes, but also "that the taxpayer not make misstatements that could hinder the Internal Revenue Service (IRS) in carrying out such functions as the verification of the accuracy of that return or a related tax return" (*United States v. Greenberg*, 735 F.2d at 31). To prove a violation of Section 7206(1), therefore, it is well established that the government is not required to prove either the intent to evade payment of taxes or the underpayment of any tax. See *United States v. Greenberg*, 735 F.2d at 31; *United States v. Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); *United States v. Taylor*, 574 F.2d at 234; *United States v. Ballard*, *supra*; *United States v. Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974). If petitioner genuinely believed that the return as a whole was substantially accurate because a "net" figure offsetting gross receipts and expenses was reported elsewhere, that would pertain to a possible defense of lack of willfulness, but it would be irrelevant to the issue of materiality. See *United States v. Taylor*, 574 F.2d at 237.

b. In any event, the record does not support petitioner's assertion that, even though he failed to report \$404,000 in gross receipts, the net income from his bail bonding business was correctly reported on his corporate tax returns. The evidence showed that petitioner's accountants handled the bail bond account as a trust account and did not "net out" the gross receipts from the bail bond business. The foundation of petitioner's argument—that deposits to the account constituted income and checks drawn on the account constituted expenses—was refuted by petitioner's corporate accountant, who testified that deposits to the account were treated as liabilities and withdrawals from the account were treated as reductions of liability. Accordingly, no figure reported on the returns reflected net income from the business. Moreover, the evidence showed that not all the

income from the bail bond business was deposited in the bail bond account. Thus, it is clear that petitioner's understatement of gross receipts was "material" under Section 7206(1).

3. Petitioner contends (Pet. 5-7, 11-12) that the district court erred by granting the government's motion to quash a subpoena issued to a Department of Justice attorney. This contention was correctly rejected by the court of appeals.

In a prior proceeding involving a search warrant issued for the office of petitioner's bail bonding business, *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983), the statement of facts in the government's petition for rehearing recited that "Appellant Young is the owner of an unincorporated bail bonding business." Petitioner sought to subpoena the government attorney who authored the petition to elicit this so-called "admission" that the bail bond business was personal, not corporate.

The district court clearly did not abuse its discretion in ruling that the testimony would be inadmissible and therefore quashing the subpoena. As the court of appeals explained (Pet. App. A2-A5), the corporate status of petitioner's business was not an issue that had been litigated in the prior proceeding, and the government in its petition "was merely restating background information not in contention" (Pet. App. A5 n.1). The statement therefore could not be regarded as a judicial admission on the part of the government with respect to that issue. In light of the abundant evidence establishing that the bail bond business was a corporate business, admitting the statement that petitioner sought to introduce would have served only to confuse the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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